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In the Supreme Court of the United States

OCTOBER TERM, 1939

In re DISBARMENT OF JOSEPH RUBINSTEIN AND CHARLES RUBINSTEIN, ATTORNEYS AT LAW

JOSEPH RUBINSTEIN AND CHARLES RUBINSTEIN, PETITIONERS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND MOTION TO DISPENSE WITH PRINTING AND SERVICE OF PORTIONS OF RECORD.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

Joseph Rubinstein and Charles Rubinstein, the above named petitioners, each in his own behalf, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered February 13, 1940, disbarring them from the practice of law.

OPINIONS BELOW

The Supreme Court of the State of Ohio rendered no opinion. The Ohio Court of Appeals for Cuyahoga County likewise rendered no opinion. The opinion of the Court of Common Pleas of the County of Cuyahoga has not been reported but is printed as Appendix A, *infra* pp. 16 *et seq.*

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered February 13, 1940 (R.). The petitioners' motions for rehearing were denied on February 28, 1940. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925, and under Section 8 of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the proceedings whereby each petitioner was required to give testimony against himself in a star chamber session without the assistance of counsel during which examination he was subjected to prolonged questioning over his protests and objections and whether the use of such testimony against him in the subsequent disbarment proceeding constituted a denial of due process of law in violation of the Constitution of the United States.

2. Whether each petitioner has been deprived of his office as an attorney and counsellor at law and of his right and privilege to serve as an attorney in the courts of the State of Ohio and has been subjected to a forfeiture, all without due process of law and in denial of equal protection of the law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. Whether the judgment below erroneously enforced a law in a manner abridging the privileges and immunities of the petitioners in violation of the Fourteenth Amendment of the Constitution of the United States.

4. Whether the judgment below unlawfully constitutes an impairment of the obligation of a contract between each petitioner and the State of Ohio in violation of Article 1, Section 10, of the Constitution of the United States.

STATUTES AND RULES OF COURT INVOLVED

Ohio General Code, Section 1707, provides as follows:

> Suspension or removal of an attorney; when. The Supreme court, court of appeals or court of common pleas may suspend or remove an attorney at law (from office) or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude. Such suspension or removal shall operate as a suspension or removal in all the courts of the state of Ohio. The clerk of court upon such suspension or removal shall send a copy thereof to the supreme court, the court of appeals, and to the federal court of the district in which said attorney resided at the time of trial for such action as is warranted. Judges of such state courts are required to cause proceedings to be instituted against an attorney at law, when it comes to the knowledge of any judge or when brought to his knowledge by the bar association of the county in which such attorney practices that he may be guilty of any of the causes for suspension, removal or reprimand.

The Rules of Practice in the Supreme Court of Ohio (Ohio State Reports) applicable to this case are as follows:

RULE XXVIII

Rules of Professional Conduct

Section 1. These rules of professional conduct shall be binding upon all members admitted to practice law in the state of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as may be determined by any court of competent jurisdiction.

The Canons of Ethics of the American Bar Association are commended; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof.

Section 2. An attorney-at-law shall not advertise or otherwise solicit professional employment. This rule shall not apply to the publication or use of ordinary professional cards or conventional listings in legal directories and newspapers.

Section 3. An attorney-at-law shall not employ another to solicit or to obtain or remunerate another for soliciting or obtaining professional employment for him.

STATEMENT

On the day of 1938, in the Court of Common Pleas of Cuyahoga County, Ohio, the Honorable Fred H. Wolf, Judge of the said court, appointed Charles Auerbach, James Dolphin, and George Bryan, attorneys practicing at the bar of that court, as a committee directed to prepare and file written charges setting forth specifications and grounds of complaint against the petitioners in the

performance of their professional duties as attorneys at law. The order recited (R.):

> "Upon oral motion and upon information, it appearing that Joseph Rubinstein, Charles Rubinstein, and Seymour A. Tarnoff, attorneys at law practicing in this court and officers hereof, are probably guilty of misconduct in their profession and office involving moral turpitude."

Prior to the institution of these proceedings an investigation touching alleged unethical practices was conducted in Cleveland by a Committee headed by a Common Pleas Judge, who was designated to conduct such investigation by order of the Court of Common Pleas of Cuyahoga County, Ohio. In the course of this investigation petitioners were subpoenaed to appear before Judge Fred H. Wolff, who was in charge of the investigation as aforesaid, examined touching a large number of cases handled by them covering a period of eight or nine years; files and office correspondence were examined and they were subjected personally to cross-examination for hours at a time behind closed doors and without having an attorney present. The testimony so elicited was transcribed and afterwards was introduced in evidence as an exhibit over petitioners' objections, to support the charges of unprofessional conduct. A Petition in Disbarment, based upon the investigation, was filed in the Common Pleas Court of Cuyahoga County against petitioners, and a trial had. The trial court found petitioners guilty of soliciting employment and of giving false testimony before Judge Wolf. The other charge was dismissed. The court

then rendered a decision disbarring petitioners from the practice of law, in all the courts of the State of Ohio.

Thereafter an appeal was prosecuted to the Court of Appeals of Cuyahoga County. This court affirmed the decision of the lower court, without opinion. In due time an appeal was prosecuted to the Supreme Court of the State of Ohio, based on questions arising under the Constitution of the United States, under authority of Section 12223-29 of the General Code of the State of Ohio, which provides, among other things, that no appeal shall be filed in the Supreme Court without its leave, or a judge thereof, except in cases involving questions arising under the Constitution of the United States. A motion for leave to appeal and to certify the record was filed at the same time.

The appeal filed as of right in the Supreme Court was based on the following assignments of error, which constitute Assignments Nos. 8, 9 and 12 filed in the Supreme Court of Ohio in behalf of each petitioner:

Assignment No. 8.

> The respondent has been deprived of his office, property and privileges and subjected to a forfeiture without due process of law and in denial of the equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Assignment No. 9.

> The court in its sentence of disbarment enforced a law abridging the privileges of respondent, a United States citizen, in violation

of the Fourteenth Amendment to the Constitution of the United States.

Assignment No. 12.

Predicating a disbarment on violation of Rule 28 of the Supreme Court of Ohio constitutes an impairment of a contractual obligation existing between respondent and the State of Ohio, in violation of Article 1, Section 10 of the Constitution of the United States of America.

These questions were raised specifically for the first time in the Supreme Court of Ohio by way of assignments of error.

The appeal was perfected in due time. Thereafter a motion was filed by the Trial Committee to dismiss the appeal on the ground that no constitutional question was involved. At the hearing on this motion all the constitutional questions raised in said three assignments of error were briefed, argued and considered in the Supreme Court. Thereafter the court rendered a decision to the effect that no debatable constitutional question was involved, and dismissed petitioners' appeal. No opinion was rendered by the Supreme Court. The motion to certify the record also filed at the same time was overruled. Thereafter a motion for a rehearing was filed in the Supreme Court of Ohio and was overruled on the 28th day of February, 1940. Thereupon the decree of disbarment became final.

SPECIFICATIONS OF ERRORS TO BE URGED

1. The court below erred in dismissing the petitioners' appeals as involving no substantial Federal question.

2. The judgments of the court below dismissing the appeal of the petitioners deprived each petitioner of his office, property and privileges and subjected him to the forfeiture of the same without due process of law and in denial of the equal protection of the law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

3. The judgment of the Court of Appeals of the County of Cuyahoga, Ohio, affirming the judgment of the Court of Common Pleas for the said County of Cuyahoga disbarring the petitioners and said judgment of disbarment deprived each petitioner of his office, property and privileges and subjected him to the forfeiture of the same without due process of law and in denial of the equal protection of the law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

4. The judgment of disbarment which became final by the judgment of the court below enforced a law of the State of Ohio abridging the privileges of each petitioner, a citizen of the United States, in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The judgment of disbarment which became final by the judgment of the court below unlawfully impaired the contractual obligation existing between the petitioners and the State of Ohio, in violation of Article I, Section 10, of the Constitution of the United States of America.

REASONS FOR GRANTING THE WRIT

The petitioners contend that their disbarment without proof of misconduct involving moral turpi-

tude is an arbitrary unreasonable act of oppression which deprives them of rights, privileges, immunities, liberties, offices and property without due process of law and contravenes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and impairs the obligation of contract in violation of Article 1, Section 10 of the Constitution of the United States.

The petitioner Joseph Rubinstein was admitted to the Ohio Bar in 1926. Charles Rubinstein was admitted in 1933. Their certificates of admission issued to them pursuant to the constitution and laws of the State of Ohio constituted contracts at least as solemn and significant as the Charter of Dartmouth College and as much entitled to protection against arbitrary forfeiture as the franchise of a railroad company or a telephone company.[1] Under Ohio General Code, Sections 1698, 1700, 1707, the petitioner could only be disbarred "for misconduct or unprofessional conduct in office involving moral turpitude".

The disbarment of the petitioners, therefore, is obviously predicated upon the finding of the Court of Common Pleas of Cuyahoga County that each petitioner testified falsely that he did not solicit clients. In other words, it clearly appears that both the Committee and the court below were convinced that the petitioners could not be disbarred merely upon proof that they accepted clients procured by solicitation of third persons. Such conduct does not involve moral turpitude; whereas

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[1] *Dartmouth College* v. *Woodward*, 4 Wheat 518; *Louisville* v. *Cumberland Tel.*, 224 U.S. 649.

perjury or false testimony in a judicial proceeding would clearly involve moral turpitude and justify disbarment.

The petitioners were accused of soliciting clients and maintaining an organization for the solicitation of business for the firm Rubinstein & Rubinstein. The Committee summoned them to testify before Judge Wolf, where they were examined without benefit of counsel, without being informed of their right to counsel, and without being given an opportunity to have counsel present. The attorneys for the Committee cross-examined each petitioner vigorously and fully and each petitioner denied that he solicited business or maintained an organization for the solicitation of business. At the trial below each petitioner testified substantially as he did at the preliminary investigation and denied that he solicited business or maintained an organization for the solicitation of business. The court found as a matter of fact that the defendants were guilty of solicitation and maintaining an organization for the solicitation of professional business, thus resolving that issue against the petitioners. There is evidence in the record from which the court might conclude that a brother of the petitioners and certain clients of petitioners did solicit other clients to retain the petitioners. It must be emphasized, however, that that evidence completely absolves the petitioners of any wrongdoing or moral turpitude.

Moral turpitude has a well understood meaning. For an act to involve moral turpitude it must be not only *malum prohibitum* but *malum in se*. It must be inherently immoral. *Dail* v. *Halter*, 6

Ohio State 228; *State Board of Medical Examiners* v. *Friedman*, 150 Tenn. 152; *Bouvier's Law Dictionary; Words and Phrases.*

Obviously Rule 28 of the Rules of Practice of the Supreme Court of Ohio, ante p. 4, does not undertake to make solicitation an act involving moral turpitude. "It is impossible to conceive that the Supreme Court of Ohio intended by Rule 28 to lay down an arbitrary rule against solicitation when the act is neither unlawful nor unethical in fact".[2] Advertising, soliciting, and fee splitting are unethical rather because it did not become a gentleman of the Temple to do these things than because these acts are inherently wrong.[3]

In determining whether due process has been denied this Court is governed by the substance of things and not by mere form.[4] When the Supreme Court of a state decides a case in such a way that a party has not had a proper opportunity to present his evidence, he has been denied due process.[5] The Federal courts will not recognize as valid an order of suspension or disbarment where the procedure in the state court was wanting in due process.[6]

Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right

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[2] Levine, J., dissenting, In re Petition of the Committee on Rule 28 of the Cleveland Bar Association, 15 O.L.A. 106.

[3] Prof. Radin, Cornell Law Quarterly, April 1939, p. 463.

[4] *Simon* v. *Craft*, 182 U.S. 436.

[5] *Sanders* v. *Shaw*, 244 U.S. 317.

[6] *In re Noell*, 93 F. (2d) 5, C.C.A. 8; See also *Selling* v. *Radford*, 243 U.S. 46; *Windsor* v. *McVeigh*, 93 U.S. 274, 277, 278; *Hovey* v. *Elliott*, 167 U.S. 409.

to use his powers of mind and body in any lawful cause.[7] Arbitrary tests by which competent persons are excluded from lawful employment cannot be imposed by state regulations even where such employment affects the public health and safety.[8]

This Court has said that the privilege of practicing law before the courts of a state is not a privilege which arises by virtue of national citizenship.[9] It may be that this view is no longer sound in the light of the later decision of this Court in *Johnston* v. *Zerbst*, 304 U. S. 458. If an attorney may be deprived of his license by the arbitrary action of a state court without any semblance of due process, members of the bar may well decline to represent clients in unpopular causes and in cases in which the judge has a fixed bias against the defendant.

It is idle to argue that the rights and privileges of an attorney at law are not rights and do not constitute property but are subject to forfeiture at the whim or caprice of any court or judge. Attorneys owe a duty to defend and protect the rights of their clients faithfully and fearlessly. This duty they cannot undertake if the penalty therefor may be deprivation of their licenses to practice upon the whim or caprice of a judge.

Whether the right of an attorney to membership in the Bar and to practice before the courts

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[7] *Smith* v. *Texas*, 233 U.S. 630.

[8] *Smith* v. *Texas*, 233 U.S. 630; *Smith* v. *Alabama*, 124 U.S. 465; *Allgeyer* v. *Louisiana*, 165 U.S. 578; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530.

[9] *Bradwell* v. *State*, 16 Wallace 130; *In re Lockwood*, 154 U.S. 116.

be regarded as a property right or merely a liberty or privilege, he cannot, we submit, be deprived of that right, liberty, or privilege without due process of law. Obviously his honor, standing, and reputation at the Bar are as much the subjects of constitutional protection as the property and charter of a corporation.

When the petitioners were charged with soliciting business and maintaining an organization for the solicitation of business, by all the canons of due process they were entitled to a fair trial of that issue. The burden was on the Committee to establish the charge by clear and convincing testimony.[10] Whether the methods of the petitioners were in full compliance with the applicable canons of ethics was in sharp dispute. The petitioners contended and believed that their practices were not in violation of the canons or rules. They testified both at the preliminary investigation and in the disbarment proceedings fully and frankly in the utmost detail as to their methods of conducting their offices.

They denied personal solicitation. They denied maintaining an organization for purposes of solicitation. Upon the facts adduced at the preliminary hearing the Committee charged them with soliciting and maintaining an organization to solicit. This obviously was the only charge which could properly be preferred. The addition of the charge of false swearing was a gratuitous, vindictive and atrocious species of oppression.

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[10] *In re Morehouse*, 8 N.P. (N.S.) 179, 19 O.D. 428; *In re Sparks*, 6 O.L.R. 575.

In effect the Committee said to each petitioner: "We think you have been guilty of soliciting. We cannot prove personal solicitation without your self-incriminating testimony. We cannot find any moral turpitude in your professional conduct. We therefore shall charge you with false swearing unless you confess. We will not specify any particulars. Our charge of false swearing will be so general that it will be impossible for you to defend. However honest may be your belief in the truth of your testimony, in the fact that you did not solicit in violation of the rules, we shall convict you of false swearing if the court finds evidence of soliciting in any cases that came to your office."

The disbarment of the petitioners for false swearing without any proof of false swearing is therefore we submit an arbitrary denial of due process and equal protection of the law and constitutes an impairment of the obligation of contract.

If the judgment below is permitted to stand, a novel and dangerous device has been perfected for the ruin and degradation of members of the Bar. Under the decision in the case at bar a lawyer handling personal injury cases and charged with solicitation will not dare to deny the charge, however innocent he may be. If he denies the charge, as did the petitioners, and testifies that he does not solicit and does not maintain an organization for soliciting and the court subsequently finds that fact against him, he is automatically convicted of false swearing and subjected to disbarment.

The record discloses that the petitioner Joseph Rubinstein, following his reprimand in 1931, scrupulously endeavored in all possible respects to

avoid even the semblance of solicitation. Neither he nor his brother Charles Rubinstein personally solicited any cases. Therefore, we submit that there is no scintilla of evidence in the record that justifies a finding that either petitioner swore falsely that he did not solicit business. Likewise there is no evidence in the record that either petitioner paid anything of value either to Milton Rubinstein who solicited many cases or to any other person for bringing cases to the firm.

As the Supreme Court of Ohio itself said in *In Re Hawke*, 107 O. S. 341, 349, "We do not understand that when the Legislature confers a right upon a citizen of Ohio, any court has an inherent right to arbitrarily, or for any cause other than that enumerated in a statute, deprive such person of such right even though he be an attorney at law who is a quasi member of the court * * *. Attorneys at law are and should be governed by the same constitutional provisions touching the jurisdiction of courts as are other persons and professions."

CONCLUSION

The decision in the court below should not be permitted to stand without review by this Court. It erroneously determines an important question of Federal law which has not been but should be settled by this Court. It is respectfully submitted that the petition for a writ of certiorari should be granted.

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